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NO. 96821-7

SUPREME COURT OF THE STATE OF WASHINGTON

THE JUDGES OF THE BENTON AND FRANKLIN COUNTIES
SUPERIOR COURT, et al.,

Respondents,

v.

MICHAEL J. KILLIAN, FRANKLIN COUNTY CLERK AND
CLERK OF THE SUPERIOR COURT,

Appellant.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON

Katherine George
WSBA No. 36288
JOHNSTON GEORGE LLP
2101 4th Avenue, Suite 860
Seattle, WA 98121
Phone (206) 832-1820
Fax (206) 770-6393
kathy@johnstongeorge.com

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I. INTRODUCTION

The Washington Constitution requires open access to court records so that the public may scrutinize the justice system. It also creates an independent office - the clerk – to keep records of superior courts. These two Constitutional provisions go hand in hand. They contemplate that the public can rely on the accuracy of court records kept by a disinterested official whose sole function is recordkeeping.

Courts have long recognized the importance of accurate information about judicial proceedings. Public scrutiny helps ensure that proceedings are fair and promotes informed discussion about the efficacy of our laws and systems. But the public's trust in the justice system depends on having access to reliable information. An impartial, independent recordkeeper is essential to instilling that trust.

For more than a century, Washington voters have elected clerks to be independent recordkeepers of the business of courts. In this case, a power struggle between judges and an elected clerk in Franklin County threatens to undermine the independence of the public's recordkeeper. To protect the trustworthiness of information so that the public can fulfill its watchdog role, this Court should protect the elected clerk's independence as a recordkeeper.

II. INTEREST AND IDENTITY OF AMICUS PARTY

Allied Daily Newspapers of Washington (“Allied”) is a trade association representing 25 daily newspapers across the state. Its members regularly use court records to inform the public about important criminal and civil cases. The accuracy of news reporting is inextricably tied to the reliability of court records.

Allied has a narrow interest in this case, which is to safeguard the independence of court clerks in documenting what happens in the superior courts. Judges are impartial in deciding cases, which is their province. When it comes to reporting on judicial proceedings, however, judges are not disinterested. They are key participants in each case and their actions are targets of public scrutiny. To give judges control over superior court recordkeeping would erase the line of separation that is designed to safeguard reliability of records.

Allied members perform an impartial function, as clerks do, when they publish legal notices for the public. Newspapers understand that they are considered trustworthy sources of such notices because they are independent and disinterested publishers.

Because Allied has an interest in the accuracy and reliability of court records, Allied submits this brief to explain the importance of

entrusting recordkeeping to a disinterested independent official. Allied has no position as to whether Franklin County Superior Court needs paper copies in addition to electronic copies of records.

III. STATEMENT OF THE CASE

This case concerns Local General Rule 3 adopted by the Superior Courts of Benton and Franklin Counties last year. That rule says in part:

While paperless courts are preferable, they should only be implemented after careful consideration of the impacts upon the Court, the legal community and the public, and only after case management systems have been configured so all of their capabilities are realized. Accordingly neither clerk shall attempt or purport to operate with 'paperless' processes unless and until the same has been approved in writing by the court. Permission will not be granted unless the Court is satisfied that appropriate workflows and work queues have been implemented, that equipment and processes have been acquired and developed to facilitate electronic signatures, and that the paperless processes do not adversely affect the Court's ability to conduct court proceedings and other court functions. As directed by the Court, the Clerks shall work diligently, collaboratively and harmoniously with the Court to satisfy all of the conditions precedent to 'paperless' court, as set forth above.

CP 33. In adopting the rule, the Judges asserted a power to control “the conduct of its ministerial officers” such as separately elected county clerks.¹

IV. ARGUMENT

A. The State Constitution Ensures that Court Records are Open to the Public and Maintained Independently from Judges.

Art. I, sec. 10 provides that justice shall be administered openly. The purpose of art. I, sec. 10 is to show how the justice system works. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 548-49 (2005). Article I, sec. 10 requires public access to all court filings and activities and is “a means by which the public’s trust and confidence in our *entire judicial system* may be strengthened and maintained.” *Id.*

While assuring openness, the State Constitution also speaks to who will maintain court records for the public. Art. IV, sec. 26 says: “The county clerk shall be by virtue of his office, clerk of the superior court.” Art. XI, sec. 5 provides for the superior court clerk to be elected.² By providing for an independent recordkeeper directly accountable to voters, the Constitution reflects the fundamental

¹ See Resolution and Order Adopting LGR 3 at <http://www.benton-franklinsuperiorcourt.com/local-rules/local-general-rule-3/> at ¶7.

² This is in contrast to the Supreme Court Reporter and Supreme Court Clerk, who are appointed by the justices pursuant to art. IV, sec. 18 and art. IV, sec. 22.

importance of documenting dispassionately what happens in the superior courts.

B. Accurate Information is Essential to the Integrity of the Justice System.

State and federal courts have often discussed the importance of accurate reporting about judicial proceedings. As the Supreme Court said in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975):

In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

Holding that States “may not impose sanctions on the publication of truthful information contained in official court records,” the Court explained:

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true

contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id. at 495. Thus, to promote court accountability to the public, journalists are protected from defamation liability when they rely on official court records. *Id.* See also *Mark v. King Broadcasting Co.*, 27 Wn.App. 344, 350-51 (1980); *Mark v. Seattle Times*, 96 Wn.2d 473, 487-88 (1981) (embracing the *Cox Broadcasting* rule). This reflects a policy that official court records serve as a measure of “proper conduct.” *Cox Broadcasting*, 420 U.S. at 495.

To serve accountability purposes, court information must be unfiltered. As this Court said:

There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

State v. Coe, 101 Wn.2d 364, 381-82 (1984), quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947).

C. Trustworthiness Depends on Independence.

A Superior Court clerk is responsible for providing unfiltered, truthful information about court cases. RCW 36.23.030(4) directs the clerk to keep “a full and perfect record” of all criminal and civil cases

adjudged in the courts. A clerk must avoid acting as an attorney, ensuring neutrality. RCW 2.32.090. Thus, whereas a judge's role is to apply the law, a clerk's role is to document what the judge did so that interested parties and the public may understand and evaluate it. *See State ex rel. Gordon v. Superior Court of Jefferson Co.*, 3 Wn. 702, 705 (1892) (distinguishing between a "proper judicial proceeding" to direct the clerk's action and interfering with a clerk's "ministerial duty"). These judicial and recordkeeping functions must remain separate, with neither subordinated to the other, if the integrity of court information is to be maintained.

V. CONCLUSION

For the foregoing reasons, this Court should make clear that a Superior Court clerk has independent authority over recordkeeping.

Dated this 29th day of July, 2019.

JOHNSTON GEORGE LLP

By: s/ Katherine George
Katherine George, WSBA 36288

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on July 29, 2019, I served a copy of the foregoing memorandum and related Motion for Leave to File an Amicus Curiae Memorandum to registered parties via the Supreme Court's web portal, including:

W. Dale Kammerer, WSBA 8218
Law, Lyman, Daniel, Kammerer & Bogdanovich P.S.
P.O. Box 11880
Olympia, WA 98508
dkammerer@lldkb.com
Attorney for Respondents

Pamela Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney
206 10th Ave. SE
Olympia, WA 98501
pamloginsky@waprosecutors.org
Attorney for Appellant

Shawn P. Sant, WSBA 35535
Franklin County Prosecuting Attorney
s.sant@co.franklin.wa.us
Attorney for Appellant



KATHERINE GEORGE

JOHNSTON GEORGE LLP

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- lisa@lldkb.com
- lnickel@co.kitsap.wa.us
- matt@tal-fitzlaw.com
- pamloginsky@waprosecutors.org
- phil@tal-fitzlaw.com
- ssant@co.franklin.wa.us

Comments:

Certificate of service attached to Amicus Curiae Memorandum

Sender Name: Katherine George - Email: kathy@johnstongeorge.com
Address:
2101 4TH AVE STE 860
SEATTLE, WA, 98121
Phone: 206-832-1820

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